BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF WEYERHAEUSER COMPANY, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, and SOUTHWEST AIR POLLUTION CONTROL AUTHORITY, Respondents.	PCHB Nos. 81-32 & 81-88 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the consolidated appeals of the partial denial of applications for pollution control tax exemption and credit certificates, came before the Pollution Control Hearings Board, Nat Washington, Gayle Rothrock and David Akana (presiding), at a formal hearing on October 26 and 27, 1981, in Lacey.

Appellant Weyerhaeuser was represented by its attorney, Robert B. Davis; respondent Department of Ecology (DOE) was represented by Patricia Hickey, Assistant Attorney General; respondent Southwest Air

Pollution Control Authority (SWAPCA) was represented by its attorney, James B. Ladley. Olympia court reporter Kim Otis recorded the proceedings.

Having heard or read the testimony, having examined the exhibits, and having considered the contentions of the parties; and the Board having issued its proposed order, and having received exceptions thereto and replies to said exceptions, and the Board having granted said exceptions in part and denying them in part, now makes these

FINDINGS OF FACT

I

In the mid-1950's, Weyerhaeuser constructed a mercury cell chlor-alkali plant in Longview for the production of chlorine and caustic with a rated capacity of 145 tons of chlorine per day. In the mid-1960's, the plant was expanded by the addition of a second cell room with an increase in capacity of 120 tons of chlorine per day.

II

The production process produces chlorine, caustic, and hydrogen by passing electrical current through sodium chlorine brine in an electrolytic cell. The mercury cell process installed at Longview was thought to be the newer and more efficient from the then-available technology from the standpoint of total energy used and purity of product. Mercury was a necessary ingredient to prevent the explosive recombining of chlorine and hydrogen. However, mercury from the process could escape into process wastewater, air and into the caustic product.

Another process, the diaphragm cell process, is also an electrolytic process. The process does not require mercury but operates at higher temperatures than a mercury cell. After cooling, the chlorine product is the same as that produced in a mercury cell but the caustic must be further refined. More energy is required using the diaphragm cell process, but there is no mercury pollution.

III

In 1970, Weyerhaeuser was operating its Longview facility with a water discharge permit issued by DOE's predecessor agency. In April and May 1970, state and federal officials met with Weyerhaeuser to discuss the discharges of mercury into the Columbia River. About this time, the state assessed a $6,000 penalty for mercury discharge violations and the United States brought action in federal court for an injunction and civil penalties for violation of the Refuse Act of 1899, 33 USC section 407.

IV

In April 1970, DOE estimated that approximately 22 pounds of mercury per day were being discharged into receiving waters. By August 1970, Weyerhaeuser reduced the discharge to a range of 1 to 11 pounds per day.

V

Because of the rising concern over the use of mercury and uncertainty over the extent of mercury regulations, and because of a predicted increased demand for chlorine, Weyerhaeuser began study of alternative processes at its Longview facility through 1971 and 1972.

VI

By December 7, 1972, neither DOE nor the Environmental Protection Agency (EPA) had issued regulations to control mercury air and water pollution although Weyerhaeuser knew that standards for both were pending. On that date, Weyerhaeuser Board of Directors decided that the chlorine plant should be converted to a non-mercury process if certain events occurred.

VII

In March and April 1973, action by DOE and EPA compelled Weyerhaeuser to select an appropriate process and control technology. On March 16, 1973, DOE issued NPDES permit No. 3450 to Weyerhaeuser which required that mercury discharges be limited to 0.2 pounds per day until December 31, 1975 and to 0.1 pounds per day thereafter. The company was further required to prevent leachate from mercury sludges from entering state waters.

On April 6, 1973, EPA issued its "National Emission Standards for Hazardous Air Pollutants" (NESHAP regulations) for mercury. The standard limited mercury emissions to less than 2,300 grams per 24 hours period. 38 Fed. Reg. 8832.

VIII

Within a week after issuance of the EPA regulations, Weyerhaeuser proceeded with conversion of the plant to conventional diaphragm technology. On May 18, 1973, Weyerhaeuser applied for a two-year waiver from EPA regulations under 40 CFR section 61.52 during which it would convert the mercury process to a diaphragm process. The waiver was granted subject to certain conditions.

IX

In its conversion, Weyerhaeuser closed mercury cell room No. 1 and changed mercury cell No. 2 to the diaphragm process. The total capacity of the plant was also increased from 265 tons per day to 385 tons per day of chlorine. The principal equipment installed were new chlorine cells and evaporators. Some existing equipment was used, however; the plant was substantially modified.

X

On October 25, 1973, Weyerhaeuser applied to the Department of Revenue (DOR) for pollution control tax credits in application No. 1183. Of a total estimated conversion and expansion cost of $18.929 million, Weyerhaeuser allocated $11.753 million to pollution control. DOR forwarded the application to DOE and SWAPCA for approval.

On July 7, 1974, DOE approved six items with an estimated cost of $983,000 as qualifying facilities. SWAPCA concluded that the chlorine gas seal scrubber costing an estimated $235,000 qualified. The decisions were appealed to this Board. The matters were remanded by the Board to the respective agencies for reconsideration pursuant to chapter 173-24 WAC, as amended, by stipulation of the parties.

XI

DOE and SWAPCA reconsidered the application. On January 29, 1981, DOE advised DOR and Weyerhaeuser that five items with a total value of $880,000 were approved as single purpose water pollution control facilities; no dual purpose facilities were identified or approved.

On June 1, 1981, SWAPCA advised DOR and Weyerhaeuser that it had no local or other authority under chapter 70.94 RCW to control mercury

emissions to the atmosphere at the time of the application. In the alternative, SWAPCA found that the facility did not physically reduce or treat any air contaminant; it was not a dual purpose facility; it was necessary, intended and operated for the manufacture of products.

Weyerhaeuser appealed the decisions to this Board and the matters were consolidated for hearing.

XII

DOE's January 29, 1981, decision excluded well services ($103,000) previously approved. The well supplies about 300 gallons per minute (GPM) of cold, make-up water for ordinary system losses and for diversions used in the production process. The cold water assists the control of thermal pollution and helps the plant meet paragraph 5 of NPDES permit No. 3450.

XIII

Pursuant to RCW 43.21B.260, SWAPCA has filed with this Board a certified copy of its Regulation I and amendments thereto which are noticed.

XIV

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board enters these

CONCLUSIONS OF LAW

I

Appellant seeks approval of its tax credit and exemption application for what are essentially portions of its new plant. The new plant incorporates a basic process change which eliminates mercury

in the manufacturing process. Consequently, the new plant simply does not reduce, control, dispose of or treat mercury wastes[1]--there are no such wastes any longer. Having thus defined its view, respondent DOE found that the plant did not meet the definition of a "facility" in RCW 82.34.010, nor did the plant meet the design, installation or operational tests of RCW 82.34.030.

II

RCW 82.34.030 provides that an application shall be approved when the "facility is designed and is operated or is intended to be operated primarily for the control, capture and removal of pollutants from the air or for the control and reduction of water pollution and that the facility is suitable, reasonably adequate, and meets the intent and purposes of chapter 70.94 RCW or chapter 90.48 RCW." The regulations further divide and define the requirements into discrete portions, which when taken together, appear to meet the criteria of RCW 82.34.030.

Appellant does not contend that chapter 173-24 WAC is inconsistent with the statute it purports to implement. Appellant contends that tax credits can be granted for process changes as well as "black box" treatment equipment under the present regulations.

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1. RCW 82.34.010(2) includes mercury as an industrial waste as applied to the chlor-alkali plant before the process change.

III

The regulation defines "facility," perhaps not co-extensively with the statute,[2] but adequately for this case:

> "Facility" shall mean any treatment works, control devices, disposal systems, machinery, equipment, structures, or property for which a certificate is applied for under chapter 82.34 RCW or any physically or conceptually identifiable part or accessories thereof. (Emphasis added.)

WAC 173-24-030(4). Portions of the new plant for which a certificate has been applied for are physically or conceptually identifiable parts of particular machinery, equipment, structures or property. These facts are evident from the application. However, the diaphragm cell is not a treatment work, control device, or disposal system as defined in RCW 82.34.010(3 and 4).

The chlor-alkali diaphragm cell does not in fact reduce, control, or dispose of mercury because it completely eliminates it as an industrial waste through a process change. We are mindful that respondent DOE is the administrative agency which is charged with the administration of the statute, and that its interpretation of the statute and its rules should be given great weight. However, the Washington State Supreme Court has also interpreted the very statute in question. In that case, Weyerhaeuser v. Department of Ecology, 86 Wn.2d 310 (1976), the Court upheld DOE's partial approval scheme under chapter 173-24 WAC. The regulation was viewed as avoiding an "inherently arbitrary, all-or-nothing operational test which would

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2. Cf. RCW 82.34.010(1)(a) and (1)(b).

ultimately defeat the legislature's purpose in enacting RCW 82.34" without subsidizing "the entire cost of new manufacturing equipment which may pollute less," which was not the legislature's intent. 86 Wn.2d at 317, 318. The Court went on to approve the concept of process changes to encourage manufacturers to meet pollution control standards:

> Most pollution control equipment is not in the form of "black box" or "tack on" equipment; it is in the form of newer, more modern manufacturing equipment which pollutes less. Without the objective and workable regulatory scheme embodied in WAC 173-24 for determining the "primary purpose" for which such more modern equipment is operated, there would be no tax credit at all for such equipment, and thus the legislature's purpose to encourage manufacturers to meet the pollution control standards would be impaired.
>
> > [A] good [pollution abatement] program is normally so closely related to the production process that very few expenditures will meet either the primary purpose or the exclusive use test.
> >
> > . . .
> >
> > Pollution problems are usually an integral part of the production process. Their control requires a plan carefully integrated into the entire operation of the business. Nearly all industrial pollution can be controlled, and effective control is best managed if the production process is designed to minimize waste. Some methods of control are to substitute fuels of power sources; substitute raw material, use different production processes, change the design of the product; capture pollutants before they leave the plant; change disposal practices so as to encourage reclamation of waste products; and recycle either waste products or resources used in the productive process.
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> 1A. Reitze, Jr., Environmental Law ch. 1, at 77-78 (1972).

Weyerhaeuser, supra at 318 (emphasis added.)

Respondent's rejection of a tax credit for a process change that eliminates a pollutant is not supported by our reading of the foregoing case, and does not comport with the "overriding legislative intent to provide tax credit only for money spent for pollution control." Weyerhaeuser, supra at 321.

IV

In order to qualify for approval, a facility must meet the further requirements of WAC 173-24-080:

> The department shall approve any facility when:
>
> (1) It was installed or intended to be installed for the primary purpose of pollution control, and;
> (2) When it is operated or intended to be operated primarily for the purpose of pollution control, and;
> (3) When it is suitable, reasonably adequate, and meets the intent and purposes of chapter 70.94 RCW or chapter 90.48 RCW;
> If the facility does not meet these criteria, it shall be denied.

V

The "installation" test (WAC 173-24-080(1)) is further elaborated in WAC 173-24-090 (filed August 4, 1971):

> A facility will be considered to be installed or intended to be installed for the primary purpose of pollution control when:
> (1) It was installed or intended to be installed in response to a requirement of the department or a regional or local air pollution control authority contained in a permit, order or regulation which applies to the particular industry or commercial establishment in question, and such facility meets the requirements of such permit, order, or regulation, or,

> (2) It was installed or intended to be installed to meet the requirements of generally applicable air or water pollution control standards or regulations promulgated by federal, state, or regional agencies, and does in fact meet or exceed all such applicable standards, or,
>
> (3) It was installed or intended to be installed to achieve the best known, available, and reasonable means of preventing and controlling air and water pollution and meets or exceeds all federal, state, and regional requirements applicable to the facility in question.

RCW 82.34.030 limits approval to a facility that is "suitable, reasonably adequate, and meets the intent and purposes of chapter 70.94 RCW or chapter 90.48 RCW." See WAC 173-24-080(3); WAC 173-24-110. Federally-based requirements, not imposed independently by specific state law, cannot substitute for state requirements. WAC 173-24-090 (filed August 4, 1971) can grant no more than the statute allows.[3]

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3. The extent to which the regulation purports to grant more than the statute permits approximates the extent the regulation goes beyond the intent of the legislature. WAC 173-24-090 (filed October 7, 1980) now clearly sets forth the statutory requirements:

> A facility will be considered to be installed or intended to be installed for the primary purpose of pollution control when:
>
> (1) It was installed or intended to be installed in response to a requirement of the department or a regional or local air pollution control authority contained in a permit, order, or regulation which applies to the particular industry or commercial establishment [in] [is] question, and such facility meets or exceeds the requirements of such permit, order, or regulation and
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> (2) It was installed pursuant to a requirement developed under chapter 90.48 RCW or 70.94 RCW and not under some other statute administered by the department such as, for example, chapter 70.95 or 70.105 RCW.

With respect to SWAPCA, there were no requirements in its Regulation I which apply to mercury emissions to the atmosphere. The absence of any SWAPCA or applicable state air regulation, law, or requirement at the time of the application prevents Weyerhaeuser from meeting the criteria of WAC 173-24-090.

With respect to the NPDES permit, DOE does not disagree that the permit also applies state requirements. However, DOE contends that other factors actually influenced Weyerhaeuser's decision to change its process: the Department of Justice action under the Refuse Act; the Environmental Protection Agency mercury regulations; the Occupational Safety and Health mercury standards; and the plant capacity expansion program. The subjective reason Weyerhaeuser changed its process is irrelevant. What is relevant is an applicable state requirement and the installation of a facility to meet the requirement. The NPDES permit imposes state requirements; the facility installed completely eliminates mercury as an effluent. Accordingly, some portion of the process change described in the application meets the requirement of RCW 82.34.030 and WAC 173-24-090 with respect to 90.48 RCW.

VI

The "operation" test (WAC 173-24-080(2)) is further elaborated in WAC 173-24-100:

> A facility is operated or intended to be operated primarily for the purpose of pollution control when:
> (1) The emissions of effluents from the commercial or industrial operation do or will contain measurably less pollution with the facility installed than they would without the facility installed, and;

> (2) For a facility other than a dual purpose facility it is not necessary to the manufacture of products.

The process change from mercury cell to diaphragm cell eliminates mercury as a pollutant. However, the diaphragm cell is necessary to the manufacture of chlorine and caustic soda and can meet the second requirement only if it is a "dual purpose facility:"

> "Dual purpose pollution control facility" or "dual purpose facility" shall mean a facility in which the portion for the purpose of pollution control is so integrated into the total facility with portions for other purposes that separation into identifiable component parts is not possible.

WAC 173-24-030(3).[4] In view of our earlier conclusion that process changes were not automatically excluded from approval, it is apparent that some conceptual portion (cost) of the replacement facility is or should be allocated to achieving the purposes of pollution control (e.g. additional "tack-on" equipment) for the old mercury cell system. This portion is so integrated into the total system that it must necessarily be conceptualized. The portion to be allocated must yet be determined by DOE under our view of the law. It is not the entire cost of the new manufacturing equipment, however.

VII

The "intent and purposes" test (WAC 173-24-080(3)) is further defined in WAC 173-24-110:

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4. The term "dual purpose facility", if too limited in scope to provide for a process change, would not, in any event, restrict the terms of the statute as interpreted by the Supreme Court.

> A facility is suitable, reasonably adequate, and meets the intent and purposes of chapter 70.94 RCW, and chapter 90.48 RCW, when:
>
> (1) Normal operation of the particular commercial or industrial operation with the facility installed will not be in violation of any provision of chapter 70.94 RCW, or chapter 90.48 RCW and;
>
> (2) Such operation will meet the requirements of any applicable permits, orders, regulations or standards of the department or a regional or local air pollution control authority.

There appears to be no dispute that Weyerhaeuser would meet this test.

VIII

Weyerhaeuser has shown that some greater portion of its new facility meets the criteria of WAC 173-24-080 as to requirements under chapter 90.48 RCW. Accordingly, DOE should reconsider its determination in light of our decision.

IX

Weyerhaeuser has not shown that any greater portion of its new facility meets the criteria of RCW 82.34.030 and WAC 173-24-090 as to requirements under chapter 70.94 RCW. Accordingly, SWAPCA's determination should be affirmed.

X

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

ORDER

1. The Department of Ecology determination on tax credit application No. 1183 submitted by the Weyerhaeuser Company is remanded for further reconsideration.

2. The Southwest Air Pollution Control Authority determination on tax credit application No. 1183 submitted by the Weyerhaeuser Company is affirmed.

DATED this 19th day of February, 1982.

POLLUTION CONTROL HEARINGS BOARD

Dissenting
NAT W. WASHINGTON, Chairman

Gayle Rothrock
GAYLE ROTHROCK, Vice Chairman

David Akana
DAVID AKANA, Member

PCHB Nos. 81-32 & 81-88

DISSENT AND PARTIAL CONCURRENCE: Nat W. Washington

I concur with the majority decision in affirming the denial by Southwest Air Pollution Control Authority (SWAPCA) in its denial of tax credit application No. 11833 submitted by Weyerhaeuser Company, but I dissent from the majority decision which holds that some greater portion of the new diaphragm cell plant meets the criteria of chapter 82.34 RCW and chapter 173.24 WAC and remands application No. 1183 to the Department of Ecology (DOE) for further reconsideration in light of the majority decision.

I am in general agreement with my colleagues in the majority concerning the Findings of Fact in this matter, but we are not in agreement as to the application of chapter 82.34 RCW, chapter 173-24 WAC and the decision of the Supreme Court in the case of Weyerhaeuser v. Department of Ecology, 86 Wn.2d 310 to these facts and to the evidence presented.

In my opinion, Weyerhaeuser failed in a number of respects to sustain its contention that the Department of Ecology erred in failing to approve its application for a pollution control tax exemption/credit certificate. I have concluded that the company failed to meet the statutory requirements set forth in RCW 82.34.010(5), RCW 82.34.010(1), RCW 82.34.030, WAC 173-24-080(1) and (2), WAC 173-24-090 and WAC 173-24-100(2).

1. Provisions of RCW 82.34.010(5) not met by Weyerhaeuser.

Before facilities can become eligible for a tax exemption certificate under chapter 82.34 RCW, they must meet the threshold

requirements of RCW 82.34.010(5), which provides that a tax exemption certificate can be issued only to plants (industrial establishments) in operation or under construction as of July 30, 1967. The electrolytic chlor-alkali diaphragm plant under consideration here is, in practical reality, a new industrial establishment which was constructed and placed in operation during the years 1973 and 1974 and was not in operation or under construction as of July 30, 1967. For this reason no part of the new diaphragm cell plant is eligible to be certified for tax exemption.

The Longview chlor-alkali plant was at all times, material to this case, a separate and independent operation from the Longview pulp mill and was being operated and managed by a separate division of the company. The plant, at and prior to the conversion, supplied chlorine and caustic soda directly or through exchange agreement to the greater part of Weyerhaeuser's nation-wide needs. The new enlarged plant performs the same separate and independent role. The old mercury cell plant, referred to as plant #1, was first constructed and placed in operation in 1957. The second mercury cell unit, referred to as plant #2, was placed in operation in 1967.

At one time Weyerhaeuser seriously considered installing add on "black box" facilities in the two old mercury cell plants for the control of mercury. Since the old plants were in operation as of July, 1967, such facilities undoubtedly would have qualified for tax exemption certification. Instead, both of the old mercury cell plants were dismanteled and taken completely out of service, and a single new

diaphragm cell plant was constructed to replace them. The daily production capacity was increased by about 45 percent from 265 tons per day to 385 tons per day, making the new Longview plant one of the largest in the west.

The production facilities of an electrolytic mercury cell chlor-alkaline plant consist largely of electrolytic cells in which chlorine and caustic soda are produced from brine. When an entire plant is converted by removing all of the old mercury cells and replacing them with new diaphragm cells, the practical and obvious result of the conversion is that the old plant is gone and a new and different plant utilizing an entirely different process has been placed in operation.[1] When the construction project involving the conversion to diaphragm cells was completed, there came into being a new, different and larger industrial establishment, which was placed in operation after July 30, 1967. The conversion of the entire chlor-alkali plant resulted in a new or different industrial establishment not eligible for tax exemption certificate, just as the

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1. Weyerhaeuser itself, in its request to EPA for a two-year waiver of federal clean air requirements dated May 18, 1943 (Exhibit 14), stated:

> We have decided to convert our two mercury cell chlor-alkali plants at Longview to a single diaphragm cell plant...
>
> Inasmuch as the two plants <u>will be replaced</u> by a single diaphragm cell plant, we have made out a single waiver for the two existing plants. (Emphasis supplied.)

conversion of an entire pulp mill from the Kraft process to the sulphite process would result in a new or different mill which would not be eligible for a certificate.

Under RCW 83.34.010(5), there is a vast difference between converting an entire plant from one process to another and the conversion of a mere subordinate component of a plant from one process to another.

Attachment 4 to the EIS (Exhibit 15) entitled "Chlorine Plant Conversion - Project Scope", well demonstrates that the conversion of the Longview chlor-alkali plant from mercury cells to diaphragm cells entailed a large and time consuming construction project which resulted in the building of a new, different and expanded plant, which replaced the old plant. At page 3 of attachment 4 it was stated:

> It is our objective to build a facility which will:
>
> 1. Meet or exceed health and safety standards (OSHA).
> 2. Meet air, water and land pollution standards and be aesthetically pleasing.
> 3. Make efficient use of manpower, energy and material resources.
> 4. Ensure quantity and quality of products to meet our need.
> 5. Optimize ease of operation.
>
> (Parenthetical material and underscoring supplied.)

The phrase "it is our objective to build a facility", shows that Weyerhaeuser recognized it was not merely installing pollution control equipment in an existing plant, but was, in fact, constructing a new, improved and enlarged plant (industrial establishment).

Items 1, 3, 4 and 5 show that more than just pollution control was involved. Item 2 shows that more than just DOE standards of mercury discharge into water was involved.

Since the new plant was not under construction as of July 30, 1967, no part of it is eligible for tax exemption/credit certification.

2. New diaphragm cell plant not a "facility" as defined by RCW 82.34.010(1).

Even if it were to be determined that the plant was in operation or under construction as of July 30, 1967, Weyerhaeuser must still meet a second test by establishing that the diaphragm cells and associated equipment, on which it seeks a tax exemption/credit certificate, constitute a "facility" within the meaning of RCW 82.34.010(1). In my view, Weyerhaeuser failed to meet this test and is therefore eligible to receive a tax exemption/credit certificate on only that small portion of the new diaphragm cell plant which is made up of the pollution control equipment of a value of $983,000 identified by DOE in its report to the Department of Revenue and Weyerhaeuser dated July 7, 1974.

RCW 82.34.010(1) provides that a facility includes "any treatment works, control devices and disposal systems, machinery, equipment, structures, property or any parts or accessories thereof installed or acquired for the primary purpose of reducing, controlling or disposing of industrial waste..." (underscoring supplied). It appears that the legislature intended that only the machinery, equipment, structures, property, parts or accessories which are parts of or accessories to treatment works, control devices or disposal systems are to considered as being facilities.

A diaphragm cell is not a "treatment works" or a "control device" as defined by RCW 82.34.010(3). This statute provides that a number

of different devices may qualify as a treatment works or a control device if it is "used for the purpose of treating, stablizing, incinerating, holding, removing or isolating sewage and industrial wastes." A diaphragm cell is used for none of these purposes. It does not treat sewage or industrial waste nor does it stabilize, incinerate, hold, remove or isolate sewage or industrial waste.

A diaphragm cell is not a "disposal system" in any sense of the word, or as defined by RCW 82.34.010. The diaphragm cell is the production component of the new plant which produces chlorine and caustic soda and is not used to collect or conduct sewage or industrial waste to a point of disposal, treatment or isolation.

Diaphragm cells and associated equipment, which are the major component of the new diaphragm cell plant, do not meet the definition of "treatment works" and "control devices" set forth in RCW 82.34.010(3) and do not meet the definition of "disposal system" set forth in RCW 82.34.010(4), therefore they do not meet the definition of "facility" [although this opinion concludes that the diaphragm cell plant does not meet the definition of "facility" as defined by RCW 82.24.010(3), I have continued to use the word in this opinion to convey its usual and ordinary non-statutory meaning] set forth in RCW 83.24.010(1). Consequently they are not eligible for certification.

The opinion in Weyerhaeuser v. DOE, 86 Wn.2d 310 does not address the issue of process change, but might be construed to allow a process change to qualify for certification. The opinion, however, does not

relieve an applicant from the burden of establishing that the new machines and equipment associated with the process change are "facilities" as defined by RCW 82.24.010(1). In other words, a process change can qualify if it meets all the tests of chapter 82.34 RCW and chapter 173-24 WAC.

Whether recovery boiler #10 was a facility, was not raised as an issue in Weyerhaeuser, since even DOE asserted that some part of the boiler was a facility. Although it was not an issue, the court at page 32, as a part of its reasoning, cited RCW 82.34.010(1) and stated that some conceptual part of the boiler was a facility.

The majority opinion in the instant case held in Conclusion of Law III that a diaphragm cell is not a treatment work, control device, or disposal system as defined in RCW 82.34.010(3) and (4), but it did not make any determination as to whether or not a diaphragm cell is a "facility" within the meaning of RCW 82.24.010.

3. Does not meet test of RCW 82.24.030, WAC 173-24-080(1) and WAC 173-24-090(1).

The diaphragm cells and associated equipment do not meet the requirements of WAC 173-24-080(1) and 90(1) because they were not installed or intended to be installed for the primary purpose of controlling water pollution. Nor, were they installed or intended to be installed primarily in response to a requirement of the department (DOE).

In my view, the desire of Weyerhaeuser to comply with chapter 90.48 RCW and DOE water pollution requirements relating to mercury was

only a minor incidental reason for its decision on December, 1972, to convert its Longview chlor-alkaline plant to the diaphragm cell process. The basic motivation of Weyerhaeuser was: (a) the need to meet stringent OSHA standards; (b) the need to replace obsolete mercury cell plant #1; (c) the need to meet anticipated strict EPA clean air standards; and (d) the desire to achieve a substantial economic gain.

(a) Need to meet OSHA mercury standards.

By 1972 the company had determined that it could meet state and federal air and water pollution requirements by fitting the existing mercury cell plant with additional control devices, but it was found that there was no feasible way it could retain the mercury cells and still meet the stringent mercury requirements Occupational Safety and Health Administration (OSHA), U. S. Department of Labor relating to a safe place to work.

During 1971 and 1972 Weyerhaeuser considered the desirability of converting from mercury cells to diaphragm cells. A slide presentation report (Exhibit 18) contains the recommendation to convert to diaphragm or MX cells and expand production capacity to 385 tons per day, which was adopted by the company's Board of Directors on December 7, 1972. This report gives strong attention to OSHA problems. On page 4 it states, "We are in violation of existing OSHA air emission standards for mercury." On page 9 it states, "We cannot meet OSHA standards even with cleanup. Therefore, no further consideration of mercury cells." On page 21, the report discusses an

alternative which was to "clean up mercury and operate." The report then states, "This alternative is rejected--it cannot satisfy the published OSHA air standards for health and safety of personnel."

Attachment 4 to the EIS (Exhibit 15) at page 3 sets forth the five objectives of the company in converting to diaphragm cells. The first objective was: "Meet or exceed health and safety standards." This refers to the health and safety standards of OSHA.

In a report by Weyerhaeuser's chemical division dated May 8, 1973, (Exhibit 13) concerning diaphragm cell conversion, the following is set forth on page 2:

> The driving forces on this project are:
>
> 1. Pressures from environmental agencies and laws relating to the mercury hazard stemming from the process now being used. We believe that no mercury cell chlorine plant can meet the new OSHA standards. (Underscoring supplied.)
>
> 2. Profit potential from an increasing chlor-alkali market.

These were the only two driving forces mentioned in the report. It is clear that threatened OSHA penalties were a strong force in bringing about Weyerhaeuser's decision to convert to diaphragm cells.

(b) Need to replace obsolete plant #1.

The fact that mercury cell plant #1 was obsolete and needed to be replaced appears to have been a very important reason why Weyerhaeuser decided on December 7, 1973, to convert to diaphragm cells. The 126 mercury cells which had a production capacity of 145 tons per day, needed to be either replaced or receive expensive renovation and

repair. However, renovation and repair could only prolong production for a few years and would not eliminate the mercury problem.

The need to replace obsolete plant #1 is convincingly set forth in Exhibit 22, chlor-alkali Business Study, Weyerhaeuser Company, May, 1971, (Business Study) at page 56 where it is stated:

> Plant #1 is nearing the end of its economic life span. It is now 15 years old and demanding increasing maintenance. Normally, plants of this type are rebuilt or shut down when they reach this age.

The following is set forth at page 55 of the Business Study (Exhibit 22):

> Three basic questions need current attention and are addressed in this report.
>
> 1. How best can the production be increased to meet projected requirements?
> 2. How best can the mercury be contained, if further mercury cell operation is allowed?
> 3. What is the optimum solution to the growing obsolescence of plant #1? (Underscoring supplied.)

The Business Study, (Exhibit 22) at page 2 makes the following statement:

> The chlor-alkali problems of increased projected chemical requirements, the mercury hazard, and a need to decide the fate of an obsolescent plant #1 have been the subject of a series of three presentations prepared by the Chemical Planning Project Team. (Underscoring supplied.)

The Business Study (Exhibit 22) focused on a number of alternatives. One alternative called Case III was studied. This alternative called for the expansion of cell room #2, the conversion of the entire operation to the diaphragm cell process, and shutting

down plant #1.[2] This was the plant ultimately adopted by Weyerhaeuser on December 7, 1972.

The obsolescence of the old mercury cell plant is directly referred to in the EIS (Exhibit 15) for the conversion project at page 3, under the heading, "Justification for the Proposed Action" as follows:

> Changes in the present system, proposed by EPA to meet requirements, would involve heavy capital expenditure on an old plant - expenditure of the order of $7,000,000. This would even then not assure compliance with standards which might yet by adopted. (Underscoring supplied.)

The obsolescence of mercury cell room #1, in which well over half of Weyerhaeuser's chlorine was produced, and the need for the company to replace it is mentioned at a number of other places in Exhibit 22.[3]

(c) The need to meet anticipated strict EPA standards.

Weyerhaeuser had a strong desire to be able to meet stringent EPA air pollution requirements which it knew were in the offing. These were requirements, which, if violated, carried extremely large penalties punishable by a fine up to $25,000 per day of violation or imprisonment for up to one year, with a second conviction bringing a fine up to $50,000 per day and imprisonment up to two years.[4] On

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2. Business Study (Exhibit 22), page 47.

3. Business Study (Exhibit 22), pages 47, 48, 51 and 134.

4. Page 3 of memo from Stuart A. Heller to J. S. Larson dated April 12, 1973, attached to Exhibit 10.

the other hand, penalties against Weyerhaeuser for the violation of DOE water regulations had not been severe. In 1970, Weyerhaueser was assessed a penalty of only $6,000 for mercury violations. By comparison, at the federal level, these same violations brought civil penalties, action in federal court for an injunction, (Finding of Fact III), and a federal criminal indictment, which was filed by the Justice Department.[5]

It appears to me that conversion to the diaphragm cell system was strongly motivated by the severe penalties for federal violations. Conversely, state violations with their small penalties appear to have been a minor factor in bringing about the conversion.

The mercury problem with EPA concerning air pollution was much more serious than the mercury problem with DOE over water pollution. The gravity of the federal air pollution problem is put in proper prospective by the EIS (Exhibit 15) at pages 11 and 13 where it is shown that the two Longview mercury cell plants were discharging 22 pounds of mercury per day into the atmosphere, but were discharging only 0.4 of a pound per day into the Columbia River.

(d) Desire to achieve substantial economic gain.

One of the major reasons for converting to the diaphragm cell process was to achieve substantial economic gain. This could be accomplished in a number of ways by the conversion.

(1) Achieve production of higher quality and more marketable caustic soda, by eliminating mercury contamination. This was a

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5. Exhibit 22, Business Study, page 4.

serious problem in the product produced by the mercury process.[6] The presence of mercury in the chlorine and caustic products is shown under item (a), page 70 of Business Study (Exhibit 22).

2. The conversion offered a chance not only to improve the efficiency of the plant, but to also expand production by about 45% to meet a projected increase in chemical requirements.[7]

The strong economic reasons for the conversion are set forth at length in Businsss Study (Exhibit 22). See also Exhibit 18, particularly the conclusion on the last page.

The construction of a completely new plant was expected by Weyerhaeuser to result in increased operating efficiency and greater profitability. Exhibit 9 is a capital expenditure appropriation request, dated December 15, 1972, for $15,251,000. It appears to have been prepared pursuant to the decision on December 7, 1972, to expend $15,000,000 for converting the Longview chlor-alkali plant. This exhibit shows that the company expected the conversion to be an excellent investment opportunity. Item 18 on the first page of the exhibit shows that the company expected to receive an 18.3% return on its investment. Item 20 shows that the company expected a cash payout

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6. Weyerhaeuser hearing memorandum, page 3.

7. Business Study (Exhibit 22), pp. 9, 10, 11, 55; Exhibit 13, page 2; Exhibit 15, attachment 4 at page 3.

in 6 years. These figures are supported by attached worksheets. Exhibit 9 shows that Weyerhaeuser expected a return of 18.3% on its investment without giving any consideration to the possibility of receiving a pollution control exemption/credit under chapter 82.34 RCW. Had Weyerhaeuser incorporated a chapter 82.34 tax exemption/credit in its computations, the expcected return on its investment would have been even higher.

(e). Weyerhaeuser records do not show DOE regulations or chapter 90.48 RCW to be a serious problem.

If Weyerhaeuser, in fact, made its conversion to diaphragm cells primarily in response to requirements of DOE and chapter 90.48 RCW, it would seem that concern about DOE regulations and the water pollution provisions of chapter 90.48 RCW would be prominently mentioned in the EIS and in the various reports on the need for conversion prepared by Weyerhaeuser officials; however, in this regard the EIS and the reports are strangely silent. Instead, these documents emphasize the need to comply with OSHA, the need to comply with EPA air regulations, the need to replace obsolete plant #1 and the desirability of conversion for economic and profit reasons.

An EIS (Exhibit 15) was required for the large scale construction project made necessary by the complete conversion. At page 3 of the EIS, under the heading "Justification for Proposed Action", Weyerhaeuser discussed only three reasons for the conversion: (1) the need to meet the tight requirements of OSHA; (2) the need to meet the stringent requirement of EPA, and (3) the need to increase the size of

the plant to meet the predicted critical shortage of chlorine on caustic soda. (This necessarily included replacing obsolete mercury plant #1.) Compliance with state pollution laws and DOE regulations with their relatively light penalties, apparently was not of enough concern to warrant being listed among the reasons for the proposed conversion. In other documents, as well as in the EIS, Weyerhaeuser officials have stated that the conversion from mercury cells to diaphragm cells was motivated by the need to comply with the requirements of OSHA and EPA and the need to expand production, with little or no comment as to problems with DOE and chapter 90.48 RCW.[8]

If concern over compliance with the mercury requirements by DOE and chapter 90.48 RCW was the cause for the conversion, it seems logical that this concern would have been prominently and frequently featured in the company's reports and in the EIS. The failure of the company to give such emphasis reinforces DOE's contention that the conversion was not undertaken primarily in response to requirements of DOE and chapter 90.48 RCW. The reason for his apparent lack of

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8. Exhibit 7, on the second unnumbered page emphasizes EPA and OSHA problems, with no mention of DOE.

Exibit 13, on the third unnumbered page, empahsizes OSHA problems and the profit potential of an increasing chlor-alkaline market. There was no mention of DOE problems.

The covering letter to Weyerhaeuser's request to EPA for a waiver (Exhibit 14) stated that conversion was necessary to comply with air and water standards and achieve increased production. The ever-present concern over OSHA was expressed on the last page. Here water standards are mentioned, but not as the primary problem.

Exhibit 18, on the fourth unnumbered page addresses the mercury problem and emphasizes the company's problems with OSHA and EPA, but does not mention DOE.

concern was that the company had already had success in greatly reducing water-born mercury discharges by improving operating practices and by utilizing conventional pollution control methods. By 1972, the amount being released from plants #1 and #2 had been reduced from many pounds per day to 0.2 pounds per day from each plant.

(f) Conversion not primarily in response to NPDES permit.

In my view, the conversion to the diaphragm cell system was not primarily in response to NPDES permit 3450 (Exhibit 10) issued by DOE. On the contrary, it appears to me that the NPDES permit was issued by DOE as a practical, proper and cooperative response to Weyerhaeuser's conditional decision on December 7, 1972, to convert to the diaphragm system.

Weyerhaeuser was apparently confident that its mercury cell system could comply with DOE's water pollution regulations during the long conversion period. This is indicated by the fact that the December 7 decision did not make securing consent from DOE a condition to going ahead with the conversion. On the other hand, securing permission from the federal government (EPA) to operate under existing emission standards, rather than the anticipated new strict standards, was a condition needed by Weyerhaeuser to give it time to carry out the extensive and time consuming conversion project. The December 7, 1972, decision to proceed with conversion was subject to "government permission to operate existing plants without change in emission

standards."[9] (Underscoring supplied.) There was no way the mercury cells could meet strict federal emission standards, so a waiver during the construction period was absolutely necessary. Weyerhaeuser's lack of concern over state standards as compared to its serious concern over federal standards strongly indicates that the conversion was not made primarily in response to DOE regulations or the NPDES permit issued by DOE.

The NPDES permit was issued by DOE to Weyerhaeuser on March 16, 1973. This was over three months after Weyerhaeuser's Board of Directors had conditionally decided to convert to the diaphragm process. None of the conditions, however, had anything to do with the NPDES permit or state water pollution control standards.

The evidence strongly indicates that the conversion was in no substantial way, if at all, brought about because of the issuance of the NPDES permit. In fact, it appears that the NPDES permit which allowed Weyerhaeuser to continue to discharge a total of 0.4 pounds of mercury per day from plants #1 and #2 into the Columbia River until December 31, 1975, was actually helpful to the company. The permit, rather than requiring Weyerhaeuser to do something it did not want to do, provided ample time for the company to proceed to completion with its already well laid conversion plans. Instead of being the cause of the conversion, it appears that the issuance of the permit gave a boost to the conversion which the company had launched three months earlier.

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9. Exhibit 8, Minutes of Board of Director's Meeting, December 7, 1972, condition 1.

The issuance of the NPDES permit appears to have been a practical, proper and environmentally sound act by DOE which gave Weyerhaeuser the time needed to completely eliminate the use of mercury in its plant.

That DOE issued NPDES permit No. 3450 to Weyerhaeuser on March 16, 1973, is a well established proven fact, but the evidence that the Company embarked on its conversion project in response to it is purely subjective. The solid objective written evidence previously discussed establishes that the conversion project was undertaken primarily in response to other substantial and compelling factors.

4. Does not meet test of WAC 173-24-100(2).

WAC 173-24-100 provides:

> A facility is operated or intended to be operated primarily for the purpose of pollution control when:
>
> (1) The emission or effluents from the commercial or industrial operation do or will contain measurably less pollution with the facility installed than they would without the facility installed, and ;
> (2) For a facility other than a dual purpose facility it is not necessary to the manufacture of products. (Underscoring supplied.)

(a) Diaphragm cells not dual purpose facilities.

It may be argued that the diaphragm cells meet the test of subsection (1), but there is no basis on which these cells can be held to meet the test in subsection (2). There is no question but that diaphragm cells are necessary to the manufacture of products, just as there was no question that boiler No. 10 in Weyerhaeuser was necessary for the manufacture of products.[10] Thus the only way for the company

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10. Weyerhaeuser, supra, page 322.

to meet the test of WAC 173-24-100(2) is to establish that diaphragm cells constitute a dual purpose facility. The test for determining compliance with RCW 82.34.030 and WAC 173-24-100 is an objective and functional test. Weyerhaeuser v. Department of Ecology, 86 Wn.2d 310, 317. Using an objective and functional test, I conclude that the diaphragm cells and associated production equipment installed by Weyerhaeuser were "other than a dual purpose facility" and were thus single purpose facilities.

The facts that can be determined by an objective and functional approach are that diaphragm cells have been used since the early 1900s for but a single purpose. That single purpose is for the production of chlorine and cuastic soda. By way of illustration, if a technically qualified person were to observe diaphragm cells and associated production equipment in operation, he would observe that they perform only one function, which is the production of chlorine and caustic soda. He would observe that they perform no pollution control functions. He would conclude from using this objective and functional approach that these were single purpose facilities and not dual purpose facilities.

(b) The diaphragm cell facility itself, a source of pollution.

The new diaphragm cell facility and associated production equipment is, itself, a source of chlorine pollution to water and air, the control of which, requires the installation of "tack-on" pollution control facilities. The diaphragm cells also are a source of aesbestos pollution which requires special equipment and procedures

for its control. These pollutants are being adequately controlled. The fact remains, however, that the new diaphragm cell installation for which a pollution control tax exemption/credit certificate is sought, is itself a source of air and water pollution which must be controlled with the court in Weyerhaeuser, at page 322 stated:

> We simply are unable to find that Boiler #10, which is itself a source of the hydrogen sulphide emissions regulated by WAC 18-36, can be, in the words of RCW 82.34.030, operated...primarily for the control, capture and removal of pollutants from the air...

On the basis of this holding, I conclude that this is another reason why the company has failed to meet the operational test of RCW 82.34.030 and WAC 173-24-100(2).

(c) Not all process changes qualify for tax exemption.

The question whether a process change can receive a tax exemption/credit certificate under chapter 83.24 RCW was not before the court in Weyerhaeuser. The boiler No. 10 installation in that case did not involve a process change. It involved the replacement of three old and inefficient recovery boilers by a single boiler (boiler No. 10) which was larger and more efficient. This decision is not authority for holding that the legislature intended all process changes to be eligible for tax exemption certification under chapter 83.34 RCW. It is possible that some process changes might be able to meet all the tests under chapter 83.34 RCW and chapter 173.24 WAC, and if they do meet all of the tests, they are eligible for certification. If they do not meet all the tests they should be denied. The Weyerhaeuser diaphragm cell process conversion fails to meet most of the tests, so certification should be denied.

5. Objective and subjective evidence - Legislative intent.

In order to meet the "primary purpose" requirements of WAC 173-24-080(1) the company had the burden of establishing that the conversion to diaphragm cells fully met the requirements of WAC 173-24-090 and WAC 173-24-100(2).

The court in Weyerhaeuser at page 319 observed that "there is serious danger of arbitrary cerfification if the 'primary' purpose test is construed to be a subjective test rather than the objective test adopted by WAC 173-24."

In my view, Weyerhaeuser has attempted to meet the requirements of WAC 173-24-090 and WAC 173-24-100(2) by using a subjective standard. In an effort to show compliance with WAC 173-24-090, the company stated in item D at page A-11 of its application for certification dated October 25, 1973, (Exhibit 20) that the diaphragm cell conversion was "being installed only in response to requirements of the Department of Ecology." (Underscoring supplied.) Support for this statement is almost entirely subjective in nature and incapable of being established by objective factual evidence. Support consists chiefly of subjective self serving statements made after the December 7, 1972 decision to convert the diaphragm cells.

On the other hand, the documentary evidence against this statement is objective, real and factual, and consists of written statements of Weyerhaeuser officials made before the tax exemption application was filed. These objective factual written statements contained in official reports and documents of the company have solid evidentiary

weight. The solid objective documentary evidence is: (1) that the old mercury plant #1 was obsolete and needed to be replaced; (2) that there was no way Weyerhaeuser could continue to operate old mercury plants #1 and #2 so as to meet strict OSHA standards and that they had to be replaced or the plant be shut down; (3) that the company was greatly concerned about the need to meet strict EPA standards known to be in the process of adoption; (4) that even aside from environmental consideratons, the combined conversion and expansion project was a financially sound venture, with a rate of return on invested capital estimated at 18.3% per year.

It is my conclusion that the legislature in adopting chapter 82.34 RCW, and DOE in adopting chapter 173.24 WAC, did not intend that a new plant, placed in operation under the facts and circumstance surrounding the Weyerhaeuser diaphragm cell conversion project, would ever be found eligible for pollution control tax credit certification.

6. Consideration of Findings of Fact and Conclusions of Law.

On the basis of the preceeding discussion of the facts, the issues and the law, I dissent from the following Findings of Fact, Conclusions of Law of the majority.

I do not agree with that part of Finding of Fact VII which reads, "In March and April of 1973, action by DOE and EPA compelled Weyerhaeuser to select an appropriate process and control technology."

Although I do not agree with this finding, I do not believe it to be pivotal. It falls short of finding that Weyerhaeuser made the conversion to diaphragm cells primarily in response to requirements of

DOE. The finding lends some support to the position of DOE which is that Weyerhaeuser was acting primarily in response to the anticipated strict mercury emission regulations of EPA, and only minimally in response to DOE and the NPDES permit. In my view, the NPDES permit did not in any way compel the conversion, but as a practical matter actually assisted the already authorized conversion by permitting Weyerhaeuser to continue to discharge 0.2 pounds of mercury per day each from plants #1 and #2 until well after the scheduled completion of the diaphragm cell conversion.

I am in disagreement with all of Conclusion of Law III except that part which states, "However, the diaphragm cell is not a treatment work, control device or disposal system as defined in RCW 82.34.010(3) and (4)." I concurr in this conclusion.

In regard to that part of Conclusion of Law III relating to legislative intent, it is my belief that DOE's rejection of the tax credit comports fully with the intent of the legislature and is consistent with the decision of the court in Weyerhaeuser. I am convinced that it was not the intent of the legislature that a pollution control tax credit be allowed under the facts in this case.

I do not agree with that part of Conclusion of Law V relating to the NPDES permit and to that part which states "accordingly some portion of the process change described in the application meets the requirements of RCW 82.34.030 and WAC 173-24-090 with respect to 90.48 RCW." I concur in the remaining of Conclusion of Law V.

I am not in agreement with Conclusion of Law VI. Unlike boiler No. 10 in Weyerhaeuser, which was a dual purpose facility, there

appears to be no way that a portion of a single purpose diaphragm cell, can relate conceptually to pollution control. Such a conceptual portion can only exist in a dual purpose facility. I can see nothing in Weyerhaeuser, chapter 82.34 RCW or chapter 173.24 WAC which lends support to the conclusion that a tax credit for the conversion to diaphragm cells can in any way be based on the hypothetical cost of "tack-on" equipment which might have been used with the old mercury cells.

In addition, I am not in agreement with footnote 4 to Conclusion of Law VI which states:

> The term 'dual purpose facility', if too limited in scope to provide for change, would not, in any event, restrict the terms of the statute as interpreted by the Supreme Court.

In my view, diaphragm cells clearly are not dual purpose facilities within the meaning of WAC 173-24-100(2) and WAC 173-24.030(3). I see nothing in Weyerhaeuser which would require the definition of "dual purpose facility" to be broadened to cover single purpose diaphragm cells.

The use of the term "dual purpose facility" in WAC 173-100(2) and WAC 173-24-030(3) appears to me to have been part of an effort on the part of DOE to incorporate the decision of the court in Weyerhaeuser into its regulations. In my view, the use of the term in these two regulations is completely consistent with the overall Weyerhaeuser decision and with that part of the decision at page 317 which specifically deals with the "necessary to manufacture" exclusion of WAC 173-100(2).

I am not in agreement with Conclusion of Law VIII. In my view the new diaphragm facility meets only the test in WAC 173-234-08(3) and fails to meet the test of subsections 80(1) and 80(2). Even accepting the theory of the majority, it would not appear that some greater portion of the entire diaphragm cell conversion meets the criteria of WAC 173-24-080, but rather that only some smaller portion, relating only to the water pollution "tack-on" facilities meets the criteria.

Since I am not in agreement with the majority on a number of Conclusions of Law, including VI and VIII, I am not in agreement with item (1) of the Order.

PARTIAL CONCURRENCE

I agree with that part of the holding of the majority in Conclusion of Law V which states:

> Federally based requirements, not imposed independently by specific state law, cannot substitute for state requirements. WAC 173-24-090 (filed August 4, 1971) can grant no more than the statute allows.

I also agree with the closely related two-part holding in Conclusion of Law IX which states:

> Weyerhaeuser has not shown that any greater portion of its new facility meets the criteria of RCW 82.34.030 and WAC 173-24-090 as to requirements under chapter 70.94 RCW. Accordingly, SWAPCA's determination should be affirmed.
>
> With respect to SWAPCA, there were no requirements in its Regulation I which apply to mercury emissions to the atmosphere. The absence of any SWAPCA or applicable state air regulation, law, or requirement at the time of the application prevents Weyerhaeuser from meeting the criteria of WAC 173-24-090.

Since I concurr with the majority in these Conclusions of Law, I also concur with the majority in part 2 of the Order which affirms the determination of SWAPCA's authority to deny certification.

Weyerhaeuser in its Exceptions to Proposed Findings of Fact, Conclusions of Law and Order, objected at great length to these two conclusions. The company is in no position to complain that references to federal requirements contained in the 1971 version of WAC 173-24-090 were removed by DOE in its 1980 amendent. The company in fact did not rely on federal NESHAP requirements in making its application for a tax exemption/credit certificate (Exhibit 20). On page A-11, item D of the application, it was stated by Weyerhaeuser that the diaphragm cells were "being installed only in response to the requirements of the Department of Ecology (underscoring supplied). The documentary evidence from appellant's own files and the testimony of its officers at the hearing refute this statement, but nevertheless this was the company's position when its application for tax exemption was filed. Since the company clearly did not rely on federal requirements when the application was filed in 1973, it is in no position to object that DOE eliminated the reference to federal requirements when WAC 173-24-090 was amended in 1980.

CONCLUSION

In my view, at the very most, Weyerhaeuser is entitled to a tax exemption certificate only on the six items of equipment which have already been approved by DOE in the amount of $983,000. I conclude, however, that DOE should not have certified these six items of

equipment, since they were installed in the new diaphragm cell plant which was not under construction as of July 30, 1967, as required by RCW 82.34.010(5). Accordingly, I would not remand the matter to DOE for further consideration. Instead I would enter an order which would affirm DOE's denial of certification for the diaphragm cells and associated production equipment and which would reverse its 1974 approval of six items of equipment.

Nat W. Washington

NAT W. WASHINGTON